

UIIdaho Law Digital Commons @ UIIdaho Law

Not Reported

Idaho Supreme Court Records & Briefs

1-7-2013

Rainey v. State Respondent's Brief Dckt. 40194

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"Rainey v. State Respondent's Brief Dckt. 40194" (2013). *Not Reported*. 1033.
https://digitalcommons.law.uidaho.edu/not_reported/1033

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

COPY

Dist. Ct. No. CV-2012-7699
Ada County

**PRO SE
PETITIONER-APPELLANT**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case.....	1
Statement of Facts and Course of Proceedings	1
ISSUE.....	3
ARGUMENT	4
Rainey Has Failed To Show Error In The District Court's Orders Denying His Request For Counsel And Summarily Dismissing His Successive Post-Conviction Petition	4
A. Introduction	4
B. This Court Should Decline To Consider Those Appellate Claims That Are Unsupported By Either Argument Or Authority	4
C. The District Court Correctly Denied Rainey's Request For Counsel And Dismissed His Successive Petition Because The Allegations In The Petition Did Not Raise The Possibility Of A Valid Claim	5
CONCLUSION.....	9
CERTIFICATE OF MAILING	9
APPENDICES	

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Brown v. State</u> , 135 Idaho 676, 23 P.3d 138 (2001)	7
<u>Charboneau v. State</u> , 140 Idaho 789, 102 P.3d 1108 (2004).....	6, 7
<u>Coleman v. Thompson</u> , 501 U.S. 722 (1991)	8
<u>Hust v. State</u> , 147 Idaho 682, 214 P.3d 668 (Ct. App. 2009)	6
<u>Judd v. State</u> , 148 Idaho 22, 218 P.3d 1 (Ct. App. 2009).....	5
<u>Martinez v. Ryan</u> , ____ U.S. ____, 132 S.Ct. 1309 (2012)	7, 8
<u>Melton v. State</u> , 148 Idaho 339, 223 P.3d 281 (Ct. App. 2009).....	5
<u>Rainey v. State</u> , S.Ct. Docket No. 38151.....	1
<u>State v. Hoisington</u> , 104 Idaho 153, 657 P.2d 17 (1983).....	4
<u>State v. Rainey</u> , Docket No. 35774, 2010 Unpublished Opinion No. 55 (Idaho App., July 22, 2010).....	1
<u>State v. Zichko</u> , 129 Idaho 259, 923 P.2d 966 (1996)	4
<u>Swader v. State</u> , 143 Idaho 651, 152 P.3d 12 (2007)	6
<u>Workman v. State</u> , 144 Idaho 518, 164 P.3d 798 (2007)	5, 6
 <u>STATUTES</u>	
I.C. § 19-4904.....	5, 6

STATEMENT OF THE CASE

Nature of the Case

John Thomas Rainey appeals, *pro se*, from the judgment entered upon the district court's orders denying counsel and summarily dismissing his successive petition for post-conviction relief.

Statement of Facts and Course of Proceedings

After Rainey pled guilty to sexual battery of a minor child sixteen or seventeen years of age, the district court imposed a unified sentence of life, with 25 years fixed. State v. Rainey, Docket No. 35774, 2010 Unpublished Opinion No. 557, p.1 (Idaho App., July 22, 2010). The conviction and sentence were affirmed on appeal. Id. at 1-6.

Rainey filed a timely *pro se* post-conviction petition alleging numerous ineffective assistance of counsel claims but, aside from his own conclusory affidavit, he did not support any of the claims with evidence. (R., pp.34-35, 44-45, 72-73; #38151 R., pp.3-10.¹) The district court denied his motion for the appointment of counsel and ultimately dismissed the petition. (R., pp.35, 45, 73; #38151 R., pp.22-58, 68-88.) Rainey appealed (R., pp.35, 45, 73; #38151 R., pp.89-92) but subsequently filed a motion to dismiss the appeal, which the Idaho

¹ The state is, contemporaneously with the filing of this brief, filing a motion requesting the Idaho Supreme Court to take judicial notice of the clerk's record and transcripts prepared in Rainey's direct appeal from his underlying criminal conviction, State v. Rainey, S.Ct. Docket No. 35774, and in his appeal from the denial of his first post-conviction petition, Rainey v. State, S.Ct. Docket No. 38151.

Supreme Court granted on June 1, 2011 (#38151 Order Granting Motion To Dismiss, entered June 1, 2011).

On April 26, 2012, Rainey, again acting *pro se*, filed a successive petition for post-conviction relief, reasserting the ineffective assistance of counsel claims he alleged in his original petition and also alleging that his sentence constituted cruel and unusual punishment and was imposed without regard for the presentence investigator's recommendations, and that the district court violated his Sixth Amendment rights by denying his request for the appointment of counsel in his first post-conviction action. (R., pp.4-14.) The district court denied Rainey's request for the appointment of counsel to pursue the successive petition, ruling that Rainey failed to present facts to raise even the possibility of a valid claim. (R., pp.34-41.) The state moved to dismiss the successive petition for the reasons set forth in the court's order denying Rainey's request for the appointment of counsel. (R., pp.42-43.) Thereafter, the court entered an order conditionally dismissing the successive petition but giving Rainey 20 days to file a response. (R., pp.44-51.) Rainey filed a motion for reconsideration of the denial of his request for appointed counsel but did not specifically respond to the court's order of conditional dismissal. (R., pp.52-55.) The district court denied the motion for reconsideration and entered an order finally dismissing the successive petition. (R., pp.52, 72-79.) The court entered a judgment of dismissal on June 26, 2012 (R., pp.80-81), from which Rainey timely appealed (R., pp.82-85).

ISSUE

Rainey's issue statement is set forth at pages 5-6 of his Appellant's brief and, due to its length, is not repeated here. The state rephrases the issue as:

Has Rainey failed to show error in the district court's orders summarily dismissing his successive post-conviction petition and denying his request for counsel?

ARGUMENT

Rainey Has Failed To Show Error In The District Court's Orders Denying His Request For Counsel And Summarily Dismissing His Successive Post-Conviction Petition

A. Introduction

Rainey challenges the district court's orders denying his request for counsel and summarily dismissing his successive post-conviction petition. (See generally Appellant's brief, pp.7-14.) With the exception of his claim that the district court erred by denying his requests for post-conviction counsel, Rainey has not identified any specific error by the district court and has not supported his appellate claims with any cogent argument or citation to legal authority; the claims are therefore waived and should not be considered by this Court on appeal. Alternatively, Rainey has failed to establish that the district court erred in denying his request for counsel and summarily dismissing his successive petition.

B. This Court Should Decline To Consider Those Appellate Claims That Are Unsupported By Either Argument Or Authority

"When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered." State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). It is also well settled that the appellate court will not review actions of the district court for which no error has been assigned and will not otherwise search the record for errors. State v. Hoisington, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983).

On appeal, Rainey has reiterated the claims in his successive post-conviction petition but, with the exception of his claim that the district court erred by declining to appoint post-conviction counsel, he has not identified any specific error by the district court, has offered virtually no argument and has cited no legal authority. (See Appellant's brief, pp.7-14) Given the lack of any meaningful argument and the complete absence of any citation to authority, this Court should decline to consider the merits of Rainey's unsupported claims.

C. The District Court Correctly Denied Rainey's Request For Counsel And Dismissed His Successive Petition Because The Allegations In The Petition Did Not Raise The Possibility Of A Valid Claim

Even if this Court considers the merits of Rainey's appellate claims, he has failed to show any basis for reversal of the district court's orders denying his request for counsel and summarily dismissing his successive petition because, as the district court correctly concluded, the allegations in the successive petition failed to raise even the possibility of a valid claim, much less present an issue of material fact entitling Rainey to an evidentiary hearing.²

A request for appointment of counsel in a post-conviction proceeding is governed by I.C. § 19-4904. The decision to grant or deny a request for court-

² A post-conviction claim is properly dismissed if the petitioner fails to present evidence sufficient to show a material issue of fact on which relief can be granted. Workman v. State, 144 Idaho 518, 522-23, 164 P.3d 798, 802-03 (2007). Because this is a higher burden than demonstrating the possibility of a valid claim necessitating the appointment of counsel, Judd v. State, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009), Melton v. State, 148 Idaho 339, 345, 223 P.3d 281, 287 (Ct. App. 2009), the state will focus on the "possibility of a valid claim" standard on the assumption that if Rainey did not show entitlement to counsel the dismissal of his claims is proper, but that if he did show entitlement to counsel then dismissal without the opportunity of counsel to appear was error.

appointed counsel lies within the discretion of the district court. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Hust v. State, 147 Idaho 682, 683, 214 P.3d 668, 669 (Ct. App. 2009). The court's discretion is not unfettered, however. If the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf," the court must appoint post-conviction counsel to assist the petitioner in developing his or her claims. Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007); Charboneau, 140 Idaho at 793, 102 P.3d at 1112. If, on the other hand, the claims in the petition are so patently frivolous that there appears no possibility that they could be developed into a viable claim even with the assistance of counsel and further investigation, the court may deny the request for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Hust, 147 Idaho at 684, 214 P.3d at 670.

When a motion for the appointment of counsel is presented, the abuse of discretion standard as applied to I.C. § 19-4904 "permits the trial court to determine whether the facts alleged are such that they justify the appointment of counsel; and, in determining whether to do so, every inference must run in the petitioner's favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts." Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13. In reviewing the denial of a motion for appointment of counsel in post-conviction proceedings, "[t]his Court will not set aside the trial court's findings of fact unless they are clearly erroneous. As to

questions of law, this Court exercises free review.” Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001), quoted in Charboneau, 140 Idaho at 792, 102 P.3d at 1111.

In denying Rainey’s request for counsel and dismissing his successive post-conviction petition, the district court thoroughly evaluated all of Rainey’s claims and supporting evidence and correctly determined, based upon the applicable legal standards and its review of the underlying criminal and initial post-conviction records, that Rainey failed to set forth adequate facts to raise even the possibility of a valid claim, much less present a genuine issue of material fact entitling him to an evidentiary hearing on any of the claims in his successive petition. (See R., pp.34-41, 44-51, 72-79.) The state adopts as its argument on appeal the district court’s analyses, as set forth in its May 9, 2012 Order Denying Appointment Of Counsel, its May 22, 2012 Order Conditionally Dismissing Successive Petition, and its June 26, 2012 Order Dismissing Successive Petition. For this Court’s convenience, copies of the district court’s orders are appended to this brief. (See Appendices A – C.)

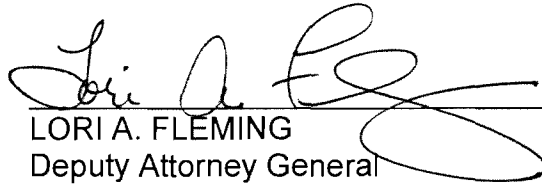
With the exception of his claim that the district court erred in denying his requests for post-conviction counsel, Rainey does not specifically challenge any of the court’s findings or legal conclusions. (See generally Appellant’s brief.) As to the denial of counsel claim, Rainey relies on Martinez v. Ryan, ___ U.S. ___, 132 S.Ct. 1309 (2012), for the proposition that the district court, having denied Rainey’s request for counsel in his first post-conviction proceeding, was required to appoint counsel in the successive post-conviction proceeding, apparently

without regard for the potential viability, or lack thereof, of any of the claims raised in the successive petition. (See Appellant's brief, pp.2-3, 10-11.) Rainey's reliance on Martinez for this proposition is wholly misplaced. In Martinez, the Supreme Court held, "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a *federal habeas court* from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 132 S.Ct. at 1320 (emphasis added). This is an equitable principle that applies a "narrow exception" to the "unqualified statement" in Coleman v. Thompson, 501 U.S. 722 (1991), "That an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default" in a federal habeas proceeding; it does not provide a Sixth Amendment right to counsel in state post-conviction proceedings. Martinez, 132 S.Ct. at 1315. Rainey has failed to show any basis for reversal of the district court's orders denying counsel and dismissing his successive post-conviction petition.

CONCLUSION

The state respectfully requests that this Court affirm the judgment and the court's orders denying counsel and summarily dismissing Rainey's successive post-conviction petition.

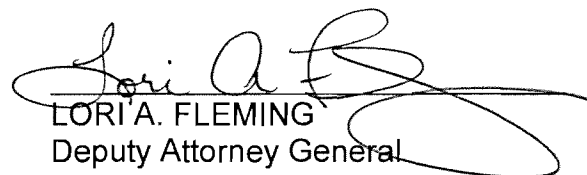
DATED this 7th day of January 2013.


LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of January 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

John Thomas Rainey
IDOC #90457
I.C.C., Q10C
P.O. Box 70010
Boise, ID 83707


LORI A. FLEMING
Deputy Attorney General

LAF/pm

Appendix A

MAY 09 2012

CHRISTOPHER D. RICH, Clerk
By JOHN WESTHERBY, Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN THOMAS RAINEY,

Petitioner,

vs.

THE STATE OF IDAHO,

Defendant.

Case No. CV-PC-2012-07699

ORDER DENYING
APPOINTMENT OF COUNSEL

On April 26, 2012, the Petitioner, John Thomas Rainey, filed a Successive Petition for Post-Conviction Relief, alleging his sentence amounted to cruel and inhuman punishment and disregarded the presentence investigator's recommendations. He also complains that in his appeal of his last post-conviction case, the Court violated his rights by not appointing counsel on appeal from the Court's decision denying his first post-conviction Petition. Further he again contends that his trial attorney failed to tell him that statements made during his psychological evaluation and pre-sentence report could be used against him and that he had a constitutional right to refuse to participate. He further contends that his attorney should have sat in on both examinations with him. He also contends that his attorney failed to provide him with an expert that could evaluate his "somnambulism" after being instructed to do so. He claims his attorney forced him to answer a questionnaire to please the Court and that his attorney promised him a certain sentence. Like before, he did not support any of these statements with any other affidavits or evidence. Furthermore, as discussed below, these are the same claims he made in his original Petition – some simply repackaged.

In his original Petition for Post-Conviction Relief, filed on August 9, 2010, Rainey alleged ineffective counsel in Case No. CR-FE-2008-0000398, claiming his attorney failed to tell him that statements made during his psychological evaluation and pre-sentence report could be used against him and that he had a constitutional right to refuse to participate. He further contended that his attorney should have sat in on both examinations with him. He also contended that his attorney failed to provide him with an expert that could evaluate his "somnambulism" after being instructed

1 to do so. Like his Successive Petition, he did not support any of these statements with any other
2 affidavits or evidence. Furthermore, as the Court found in addressing this original Petition, his
3 factual allegations were not supported by the record. The Court denied him counsel at public
4 expense and ultimately entered judgment dismissing the Petition. He appealed. On appeal, the
5 Court denied him counsel and ultimately, the Court of Appeals dismissed his appeal on June 6,
2011.

6 The Court takes judicial notice of the underlying record, including the guilty plea taken on
7 July 25, 2008, the sentencing held on October 8, 2008, and the I.C. § 19-2522 psychological
8 evaluation. The Court also takes judicial notice of the record on his prior Petition for Post-
Conviction Relief, Case No. CV-PC-2010-15707.

9 Once again, in this Successive Petition, the record demonstrates that he was clearly
10 informed by his attorney *and* the Court about his constitutional right to remain silent and,
11 moreover, he acknowledged in the record that he had been informed. In addition, as the Court
12 found in his first Petition, he has no right to counsel during these evaluations. Based on the
13 documents in the file, in an exercise of discretion, the Court again finds Rainey is not entitled to
14 appointment of counsel at public expense because, like before, taking every inference in his favor,
15 he fails to allege facts that raise the *possibility* of a valid claim on a Successive Petition. The Court
16 finds that all of the claims alleged in the Successive Petition are frivolous. By this decision, the
17 Court is providing Rainey sufficient notice regarding the basis for its ruling to enable him to
provide additional facts, if they exist, to demonstrate the existence of a non-frivolous claim.

18 ANALYSIS

19 Rainey's request for appointment of counsel for this Successive Petition is governed by
20 I.C. §19-4904.¹ In an action for post-conviction relief, applicants do not have a constitutional right
21 to counsel. *Rios-Lopez v. State*, 144 Idaho 340, 160 P.3d 1275 (Ct. App. 2007). A petitioner is not
22 entitled to appointment of counsel at public expense if he fails to allege facts that raise the
23 *possibility* of a valid claim. *Judd v. State*, 148 Idaho 22, 218 P.3d 1 (Ct. App. 2009); I.C. § 19-

24 ¹ I.C. § 19-4904. If the applicant is unable to pay court costs and expenses of representation, including stenographic,
25 printing, witness fees and expenses, and legal services, these costs and expenses, and a court-appointed attorney *may*
26 be made available to the applicant in the preparation of the application, in the trial court, and on appeal, and paid, on
order of the district court, by the county in which the application is filed.

1 4904. In making that determination, the Court takes all inferences in the petitioner's favor. *Id.* at
2 792, 102 P.3d at 1111; *Brown v. State*, 135 Idaho 676, 679, 23 P.3d 138, 141 (2001). If the Court
3 denies the motion for appointment of counsel, the Court must also provide the petitioner with
4 sufficient notice regarding the basis for its ruling to enable him to provide additional facts, if they
5 exist, to demonstrate the existence of a non-frivolous claim. *Id.*; *Swader v. State*, 143 Idaho 651,
653-54, 152 P.3d 12, 15-16 (2007).

6 The petitioner must first establish need. *See* I.C. § 19-854(b). The Court finds that Rainey
7 has met the requirement. However, his claims in his Successive Petition are frivolous and he is not
8 entitled to relief.

9 Successive post-conviction applications are prohibited by I.C. §19-4908² "where the
10 petitioner 'knowingly, voluntarily and intelligently' waived the grounds for which he now seeks
11 relief, or offers no 'sufficient reason' for the omission of those grounds in his 'original,
12 supplemental or amended petition.'" *Palmer v. Dermitt*, 102 Idaho 591, 593, 635 P.2d 955, 957
13 (1981) (emphasis added); *see also, Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct.
14 App. 1999). The Uniform Post-Conviction Procedure Act (UPCPA) is designed to address
15 collateral attacks upon allegedly improper convictions and sentences, not collateral attacks upon
16 other post-conviction proceedings. *See Wolfe v. State*, 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct.
17 App. 1987). "[T]he ultimate focus of the proceeding would remain, as it should, on whether the
18 second application has raised not merely a question of post-conviction counsel's performance but
19 substantive grounds for relief from the conviction and sentence." *Wolfe*, 113 Idaho at 339, 743
20 P.2d at 992; *See Griffin v. State*, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006). A
21 successive petition for post-conviction relief may be summarily dismissed if the grounds for relief
22 were finally adjudicated or waived in the previous post-conviction proceeding. I.C. § 19-4908.
23 *Griffin v. State*, 142 Idaho 438, 441-442, 128 P.3d 975, 978-979 (Ct. App. 2006).

24 ² I.C. § 19-4908. "All grounds for relief available to an applicant under this act must be raised in his original,
25 supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and
26 intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the
applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground
for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental,
or amended application."

1 The Court, therefore, must determine whether the new claims were finally adjudicated in
2 the first proceeding or whether there was "sufficient reason" for Rainey to have omitted these
3 "new grounds." In addition, a number of Rainey's claims regarding the propriety of this Court's
4 sentence are not cognizable post-conviction claims and he is bound by res judicata because this
5 Court's sentence was appealed and affirmed. Finally, many of Rainey's claims are factually
6 disproved by the record. "If the record conclusively disproves an essential element of a post-
7 conviction claim," or if the petitioner's allegations fail as a matter of law, summary dismissal is
8 appropriate. *McKay v. State*, 148 Idaho 567, 225 P.3d 700 (2010); *Workman v. State*, 144 Idaho
518, 523, 164 P.3d 798, 803 (2007); *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220
(1990).

9 **A. The challenge to his sentence is not a proper basis for post-conviction relief**
10 **and there is no factual basis for any of his claims related to his sentence in any**
11 **event.**

12 Like before, Rainey never filed any affidavits creating a factual issue regarding the Court's
13 sentence, including mitigating evidence or errors in the presentence investigation report. The Court
14 is not required to accept mere conclusory allegations, unsupported by admissible evidence, or a
15 petitioner's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App.
1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

16 However, claims that a sentence is unduly harsh affords no basis for post-conviction relief
17 if the sentence is otherwise legal. *Murray v. State*, 121 Idaho 918, 922, 828 P.2d 1323, 1327 (Ct.
18 App. 1992); *Brandt v. State*, 118 Idaho 350, 796 P.2d 1023 (1990); *Ferrier v. State*, 115 Idaho
886, 771 P.2d 550 (Ct. App. 1989); *Williams v. State*, 113 Idaho 685, 747 P.2d 94 (Ct. App. 1987);
19 *Ramirez v. State*, 113 Idaho 87, 741 P.2d 374 (Ct. App. 1987). A post-conviction relief proceeding
20 under I.C. §19-4901 is designed to permit a challenge to an underlying conviction or to an illegal
21 sentence; it is not intended as a means of pursuing a collateral attack upon the manner in which the
22 trial court exercised its sentencing discretion. *Id.*; see *Brandt*, 118 Idaho at 352, 796 P.2d at 1025.
23 Moreover, the remedy provided by the post-conviction procedure act is not a substitute for an
24 appeal from a sentence or conviction. I.C. §19-4901(b).

25 In addition, to the extent Rainey makes claims that the Court did not follow the plea
26 agreement, the record clearly establishes that the Court was not bound by the plea agreement and

1 that Rainey was fully aware that the Court was not bound. There is no factual basis for this claim.
2 "If the record conclusively disproves an essential element of a post-conviction claim," or if the
3 petitioner's allegations fail as a matter of law, summary dismissal is appropriate. *McKay v. State*,
4 148 Idaho 567, 225 P.3d 700 (2010); *Workman v. State*, 144 Idaho 518, 523, 164 P.3d 798, 803
(2007); *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990).

5 Finally, this Court's sentence was challenged on appeal and it was upheld. When legal
6 issues are decided in a criminal action on direct appeal, the defendant is barred by the doctrine of
7 *res judicata* from raising them again in a post-conviction relief proceeding. *State v. Beam*, 115
8 Idaho 208, 210, 766 P.2d 678, 680 (1988); *State v. Fetterly*, 115 Idaho 231, 233, 766 P.2d 701,
9 703 (1988). Thus, all issues raised by Rainey related to the Court's sentence, including the
10 victim's history, are barred or have no factual basis. "If the record conclusively disproves an
11 essential element of a post-conviction claim," or if the petitioner's allegations fail as a matter of
12 law, summary dismissal is appropriate. *McKay v. State*, 148 Idaho 567, 225 P.3d 700 (2010);
13 *Workman v. State*, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); *Stuart v. State*, 118 Idaho 865,
14 869, 801 P.2d 1216, 1220 (1990).

15 **B. Rainey does not raise any new contentions in his Successive Petition and does**
16 **not establish why the contentions were not raised in his original Petition.**

17 On August 9, 2010, Rainey filed his original Petition for Post-Conviction Relief, alleging
18 ineffective counsel in Case No. CR-FE-2008-0000398, based on his allegation that his attorney
19 failed to tell him that statements made during his psychological evaluation and pre-sentence report
20 could be used against him and that he had a constitutional right to refuse to participate. He further
21 contended that his attorney should have sat in on both examinations with him. He also contended
22 that his attorney failed to provide him with an expert that could evaluate his "somnambulism" after
23 being instructed to do so. He did not support any of these statements with any other affidavits or
24 evidence. Furthermore, his factual allegations were not supported by the record.

25 The record proved that Rainey was clearly informed by his attorney *and* by the Court about
26 his constitutional right to remain silent during the pre-sentence report and during his psychological
evaluation. He was also clearly informed before participating in either that any statements he made
could be used against him at sentencing. "If the record conclusively disproves an essential element
of a post-conviction claim," or if the petitioner's allegations fail as a matter of law, summary

dismissal is appropriate. *McKay v. State*, 148 Idaho 567, 225 P.3d 700 (2010); *Workman v. State*, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990). The record also proved that he acknowledged he had been informed. Moreover, as a matter of law, he has no constitutional right to have his counsel attend any evaluation, including the pre-sentence investigation. *Hughes v. State*, 148 Idaho 448, ___, 224 P.3d 515, 528-529 (Ct. App. 2009); *Stuart v. State*, 145 Idaho 467, 180 P.3d 506 (Ct. App. 2007).

Rainey also claimed, without evidence, that his trial counsel was ineffective because he did not hire an expert on "somnambulism." However, after being specifically alerted to the fact that he must support his claims with evidence, Rainey never supported this claim. The Court informed Rainey that while this contention could properly be considered in an application for post-conviction relief, *Vick v. State*, 131 Idaho 121, 952 P.2d 1257 (Ct. App. 1998), in order to succeed on an ineffective assistance of counsel claim based on trial counsel's failure to procure expert witnesses, he "must assert *facts* that would have been discovered by additional investigation and should offer expert testimony that would have been produced if the funds to hire the experts had been requested." *Aeschliman v. State*, 132 Idaho 397, 405, 973 P.2d 749, 757 (Ct. App. 1999) (quoting *State v. Porter*, 130 Idaho 772, 793, 948 P.2d 127, 146 (1997)(emphasis added)). In fact, the Court informed him of this when it denied him counsel on August 17, 2010, and again in its Order Conditionally Dismissing Petition issued on August 18, 2010. In his response, he simply reargued his case and provided no evidence to support this claim.

In his Successive Petition he is once again raising the very same issues. He cannot use a Successive Petition to simply reargue his earlier Petition. Moreover, to the extent that any of his claims are slightly different, Rainey has not explained why they could not have been raised in his first Petition.

C. Claims related to the Court's decision to deny Rainey appointed counsel on his original Post-Conviction Petition appeal are not cognizable.

Rainey complains that this Court violated his constitutional rights by denying his Motion for Appointment of Counsel on Appeal in the original Petition. Rainey could have raised this issue on appeal from the Court's denial on his original post-conviction Petition and did not. While he complains that he was indigent, the Court takes judicial notice of the Court's order allowing for

1 partial payment in the original Petition and the fact that he actually made payments consistent with
2 the Court's order.


3 When legal issues are decided in a criminal action on direct appeal or could have been
4 raised on appeal, the defendant is barred by the doctrine of *res judicata* from raising them again in
5 a post-conviction relief proceeding. *State v. Beam*, 115 Idaho 208, 210, 766 P.2d 678, 680 (1988);
6 *State v. Fetterly*, 115 Idaho 231, 233, 766 P.2d 701, 703 (1988). Thus, all issues raised by Rainey
7 related to the Court's decision to deny him counsel on appeal from the Court's order denying
8 counsel are barred or have no factual basis.

9 Therefore, based on the documents in the file, in an exercise of discretion, the Court finds
10 Rainey is not entitled to appointment of counsel at public expense in this Successive Petition
11 because, taking every inference in his favor, he failed to allege facts that raised the *possibility* of a
12 valid claim cognizable as a successive petition for post-conviction before this Court.

13 Therefore, the Court denies his Motion for Appointment of Counsel.

14 **IT IS SO ORDERED.**

15 Dated this 8th day of May 2012.

16 
17 _____
18 Cheri C. Copsey, District Judge

1 I, Christopher D. Rich, the undersigned authority, does hereby certify that on 10 May
2 2012 I mailed, by United States Mail, one copy of the **ORDER DENYING APPOINTMENT OF**
3 **COUNSEL** as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause
4 in envelopes addressed as follows:
5

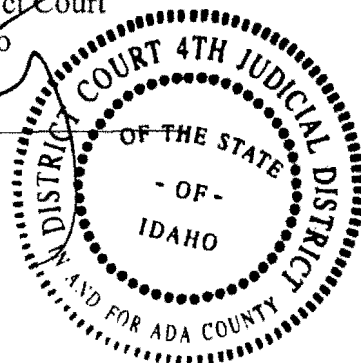
6 JOHN THOMAS RAINEY
7 IDOC NO 90457
8 ISCI 140-9A
9 PO BOX 14
10 BOISE ID 83707-0014

11 GREG H BOWER
12 ADA COUNTY PROSECUTING ATTORNEY
13 JEAN FISHER
14 DEPUTY PROSECUTING ATTORNEY
15 INTERDEPARTMENTAL MAIL
16

17 CHRISTOPHER D. RICH
18 Clerk of the District Court
19 Ada County, Idaho

20 Date: 5/9/12

21 By [Signature]
22 Deputy Clerk



Appendix B

MAY 22 2012

CHRISTOPHER D. RICH, Clerk
By LUCILLE DANSEREAU
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN THOMAS RAINEY,

Petitioner,

vs.

THE STATE OF IDAHO,

Defendant.

Case No. CV-PC-2012-07699

**ORDER
CONDITIONALLY DISMISSING
SUCCESSIVE PETITION**

On April 26, 2012, the Petitioner, John Thomas Rainey, filed a Successive Petition for Post-Conviction Relief, alleging his sentence amounted to cruel and inhuman punishment and the Court disregarded the presentence investigator's sentencing recommendations. He also complains that in his appeal of his last post-conviction case, the Court violated his rights by not appointing counsel on appeal from the Court's decision denying his first post-conviction Petition. Further, he again contends that his trial attorney failed to tell him that statements made during his psychological evaluation and pre-sentence report could be used against him and that he had a constitutional right to refuse to participate. He further contends that his attorney should have sat in on both examinations with him. He also contends that his attorney failed to provide him with an expert that could evaluate his "somnambulism" after being instructed to do so. He claims his attorney forced him to answer a questionnaire to please the Court and that his attorney promised him a certain sentence. Like before, he did not support any of these statements with any other affidavits or evidence. Furthermore, as discussed below, these are the same claims he made in his original Petition – some simply repackaged.

In his original Petition for Post-Conviction Relief, filed on August 9, 2010, Rainey alleged ineffective counsel in Case No. CR-FE-2008-0000398, claiming his attorney failed to tell him that statements made during his psychological evaluation and pre-sentence report could be used against

1 him and that he had a constitutional right to refuse to participate. He further contended that his
2 attorney should have sat in on both examinations with him. He also contended that his attorney
3 failed to provide him with an expert that could evaluate his "somnambulism" after being instructed
4 to do so. Like his Successive Petition, he did not support any of these statements with any other
5 affidavits or evidence. Furthermore, as the Court found in addressing this original Petition, his
6 factual allegations were not supported by the record. The Court denied him counsel at public
7 expense and ultimately entered judgment dismissing the Petition. He appealed. On appeal, the
8 Court denied him counsel and ultimately, the Court of Appeals dismissed his appeal on June 6,
9 2011.

10 The Court took judicial notice of the underlying record, including the guilty plea taken on
11 July 25, 2008, the sentencing held on October 8, 2008, and the I.C. § 19-2522 psychological
12 evaluation. The Court also took judicial notice of the record on his prior Petition for Post-
13 Conviction Relief, Case No. CV-PC-2010-15707.

14 Once again, in this Successive Petition, contrary to his contention, the record demonstrates
15 that he was clearly informed by both his attorney *and* the Court about his constitutional right to
16 remain silent. Moreover, he acknowledged in the record he had been informed. In addition, as the
17 Court found in his first Petition, he has no right to counsel during these evaluations. Based on the
18 documents in the file, in an exercise of discretion, the Court found Rainey was not entitled to
19 appointment of counsel at public expense because, like before, taking every inference in his favor,
20 he failed to allege facts that raise the *possibility* of a valid claim on a Successive Petition. The
21 Court found that all of the claims alleged in the Successive Petition are frivolous. Therefore, the
22 Court denied his Motion for Attorney on May 7, 2012.

23 Having reviewed the Successive Petition and any evidence in a light most favorable to
24 Rainey, the Court finds that it is satisfied that Rainey is not entitled to successive post-conviction
25 relief. I.C. § 19-4906(2). The Court further finds there is no dispute of material fact and no purpose
26 would be served by any further proceedings. Therefore, by this order, the Court is indicating its
intention to dismiss Rainey's Successive Petition.

Rainey and the State may reply to the Court's notice of the proposed dismissal within 20
days. In light of his reply, if any, or any failure to reply, the Court may order the Successive

Petition dismissed, grant leave to file an amended application or, direct that the proceedings otherwise continue.

ANALYSIS

Successive post-conviction applications are prohibited by I.C. §19-4908¹ “where the petitioner ‘knowingly, voluntarily and intelligently’ waived the grounds for which he now seeks relief, or offers no ‘sufficient reason’ for the omission of those grounds in his ‘original, supplemental or amended petition.’” *Palmer v. Dermitt*, 102 Idaho 591, 593, 635 P.2d 955, 957 (1981) (emphasis added); *see also, Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999). The Uniform Post-Conviction Procedure Act (UPCPA) is designed to address collateral attacks upon allegedly improper convictions and sentences, not collateral attacks upon other post-conviction proceedings. *See Wolfe v. State*, 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct. App. 1987). “[T]he ultimate focus of the proceeding would remain, as it should, on whether the second application has raised not merely a question of post-conviction counsel's performance but substantive grounds for relief from the conviction and sentence.” *Wolfe*, 113 Idaho at 339, 743 P.2d at 992; *See Griffin v. State*, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006). A successive petition for post-conviction relief may be summarily dismissed if the grounds for relief were finally adjudicated or waived in the previous post-conviction proceeding. I.C. § 19-4908. *Griffin v. State*, 142 Idaho 438, 441-442, 128 P.3d 975, 978-979 (Ct. App. 2006).

The Court, therefore, must determine whether the new claims were finally adjudicated in the first proceeding or whether there was “sufficient reason” for Rainey to have omitted these “new grounds.” In addition, a number of Rainey’s claims regarding the propriety of this Court’s sentence are not cognizable post-conviction claims and he is bound by res judicata because this Court’s sentence was appealed and affirmed. Finally, many of Rainey’s claims are factually disproved by the record. “If the record conclusively disproves an essential element of a post-conviction claim,” or if the petitioner’s allegations fail as a matter of law, summary dismissal is

¹ I.C. § 19-4908. “All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.”

appropriate. *McKay v. State*, 148 Idaho 567, 225 P.3d 700 (2010); *Workman v. State*, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990).

A. The challenge to his sentence is not a proper basis for post-conviction relief and there is no factual basis for any of his claims related to his sentence in any event.

Like before, Rainey never filed any affidavits creating a factual issue regarding the Court's sentence, including mitigating evidence or errors in the presentence investigation report. The Court is not required to accept mere conclusory allegations, unsupported by admissible evidence, or a petitioner's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

However, claims that a sentence is unduly harsh affords no basis for post-conviction relief if the sentence is otherwise legal. *Murray v. State*, 121 Idaho 918, 922, 828 P.2d 1323, 1327 (Ct. App. 1992); *Brandt v. State*, 118 Idaho 350, 796 P.2d 1023 (1990); *Ferrier v. State*, 115 Idaho 886, 771 P.2d 550 (Ct. App. 1989); *Williams v. State*, 113 Idaho 685, 747 P.2d 94 (Ct. App. 1987); *Ramirez v. State*, 113 Idaho 87, 741 P.2d 374 (Ct. App. 1987). A post-conviction relief proceeding under I.C. §19-4901 is designed to permit a challenge to an underlying conviction or to an illegal sentence; it is not intended as a means of pursuing a collateral attack upon the manner in which the trial court exercised its sentencing discretion. *Id.*; see *Brandt*, 118 Idaho at 352, 796 P.2d at 1025. Moreover, the remedy provided by the post-conviction procedure act is not a substitute for an appeal from a sentence or conviction. I.C. §19-4901(b).

In addition, to the extent Rainey makes claims that the Court did not follow the plea agreement, the record clearly establishes that the Court was not bound by the plea agreement and that Rainey was fully aware that the Court was not bound. There is no factual basis for this claim. "If the record conclusively disproves an essential element of a post-conviction claim," or if the petitioner's allegations fail as a matter of law, summary dismissal is appropriate. *McKay v. State*, 148 Idaho 567, 225 P.3d 700 (2010); *Workman v. State*, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990).

Finally, this Court's sentence was challenged on appeal and it was upheld. When legal issues are decided in a criminal action on direct appeal, the defendant is barred by the doctrine of

1 *res judicata* from raising them again in a post-conviction relief proceeding. *State v. Beam*, 115
2 Idaho 208, 210, 766 P.2d 678, 680 (1988); *State v. Fetterly*, 115 Idaho 231, 233, 766 P.2d 701,
3 703 (1988). Thus, all issues raised by Rainey related to the Court's sentence, including the
4 victim's history, are barred or have no factual basis. "If the record conclusively disproves an
5 essential element of a post-conviction claim," or if the petitioner's allegations fail as a matter of
6 law, summary dismissal is appropriate. *McKay v. State*, 148 Idaho 567, 225 P.3d 700 (2010);
7 *Workman v. State*, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); *Stuart v. State*, 118 Idaho 865,
8 869, 801 P.2d 1216, 1220 (1990).

9 **B. Rainey does not raise any new contentions in his Successive Petition and does**
10 **not establish why the contentions were not raised in his original Petition.**

11 On August 9, 2010, Rainey filed his original Petition for Post-Conviction Relief, alleging
12 ineffective counsel in Case No. CR-FE-2008-0000398, based on his allegation that his attorney
13 failed to tell him that statements made during his psychological evaluation and pre-sentence report
14 could be used against him and that he had a constitutional right to refuse to participate. He further
15 contended that his attorney should have sat in on both examinations with him. He also contended
16 that his attorney failed to provide him with an expert that could evaluate his "somnambulism" after
17 being instructed to do so. He did not support any of these statements with any other affidavits or
18 evidence. Furthermore, his factual allegations were not supported by the record.

19 The record proved that Rainey was clearly informed by his attorney *and* by the Court about
20 his constitutional right to remain silent during the pre-sentence report and during his psychological
21 evaluation. He was also clearly informed before participating in either that any statements he made
22 could be used against him at sentencing. "If the record conclusively disproves an essential element
23 of a post-conviction claim," or if the petitioner's allegations fail as a matter of law, summary
24 dismissal is appropriate. *McKay v. State*, 148 Idaho 567, 225 P.3d 700 (2010); *Workman v.*
25 *State*, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d
26 1216, 1220 (1990). The record also proved that he acknowledged he had been informed.
Moreover, as a matter of law, he has no constitutional right to have his counsel attend any
evaluation, including the pre-sentence investigation. *Hughes v. State*, 148 Idaho 448, ___, 224 P.3d
515, 528-529 (Ct. App. 2009); *Stuart v. State*, 145 Idaho 467, 180 P.3d 506 (Ct. App. 2007).

1 Rainey also claimed, without evidence, that his trial counsel was ineffective because he did
2 not hire an expert on "somnambulism." However, after being specifically alerted to the fact that he
3 must support his claims with evidence, Rainey never supported this claim. The Court informed
4 Rainey that while this contention could properly be considered in an application for post-
5 conviction relief, *Vick v. State*, 131 Idaho 121, 952 P.2d 1257 (Ct. App. 1998), in order to succeed
6 on an ineffective assistance of counsel claim based on trial counsel's failure to procure expert
7 witnesses, he "must assert *facts* that would have been discovered by additional investigation and
8 should offer expert testimony that would have been produced if the funds to hire the experts had
9 been requested." *Aeschliman v. State*, 132 Idaho 397, 405, 973 P.2d 749, 757 (Ct. App. 1999)
10 (quoting *State v. Porter*, 130 Idaho 772, 793, 948 P.2d 127, 146 (1997)(emphasis added)). In fact,
11 the Court informed him when it denied him counsel on August 17, 2010, and again in its Order
12 Conditionally Dismissing Petition issued on August 18, 2010. In his response, he simply re-argued
13 his case and provided no evidence to support this claim.

14 In his Successive Petition, he is once again raising the very same issues. He cannot use a
15 Successive Petition to simply re-argue his earlier Petition. Moreover, to the extent that any of his
16 claims are slightly different, Rainey has not explained why they could not have been raised in his
17 first Petition.

18 **C. Claims related to the Court's decision to deny Rainey appointed counsel on his**
19 **original post-conviction Petition appeal are not cognizable.**

20 Rainey complains that this Court violated his constitutional rights by denying his Motion
21 for Appointment of Counsel on Appeal in the original Petition. Rainey could have raised this issue
22 on appeal from the Court's denial on his original post-conviction Petition and did not. While he
23 complains that he was indigent, the Court takes judicial notice of the Court's order allowing for
24 partial payment in the original Petition and the fact that he actually made payments consistent with
25 the Court's order.

26 When legal issues are decided in a criminal action on direct appeal or could have been
raised on appeal, the defendant is barred by the doctrine of *res judicata* from raising them again in
a post-conviction relief proceeding. *State v. Beam*, 115 Idaho 208, 210, 766 P.2d 678, 680 (1988);
State v. Fetterly, 115 Idaho 231, 233, 766 P.2d 701, 703 (1988). Thus, all issues raised by Rainey

1 related to the Court's decision to deny him counsel on appeal from the Court's order denying
2 counsel are barred or have no factual basis.


3 CONCLUSION

4 As discussed above, having reviewed the Successive Petition and any evidence in a light
5 most favorable to Rainey, the Court finds that it is satisfied that Rainey is not entitled to file this
6 Successive Petition and is not entitled to post-conviction relief. I.C. §§ 19-4906(2), 19-4908. The
7 Court further finds there is no dispute of material fact and no purpose would be served by any
8 further proceedings. Therefore, by this order, the Court is indicating its intention to dismiss
9 Rainey's Successive Petition.

10 Rainey and the State may reply to the Court's notice of the proposed dismissal within 20
11 days. In light of his reply, if any, or any failure to reply, the Court may order the Successive
12 Petition dismissed, grant leave to file an amended application or, direct that the proceedings
13 otherwise continue.

14 **IT IS SO ORDERED.**

15 Dated this 22nd day of May 2012.

16 

17 _____
18 Cheri C. Copsey, District Judge
19
20
21
22
23
24
25
26

1 I, Christopher D. Rich, the undersigned authority, does hereby certify that on May 23rd,
2 2012, I mailed one copy of the **ORDER CONDITIONALLY DISMISSING SUCCESSIVE**
3 **PETITION** as notice pursuant to Rule 77(d) I.C.R. to each of the parties as follows:

4 JOHN THOMAS RAINEY
5 IDOC NO. 90457
6 I.S.C.I. 140-9A
7 P.O. BOX 14
8 BOISE, IDAHO 83707-0014

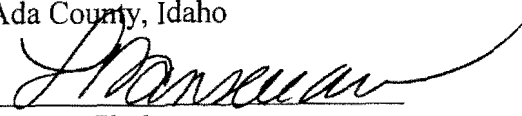
9 JEAN FISHER
10 DEPUTY PROSECUTING ATTORNEY
11 INTERDEPARTMENTAL MAIL

12 CHRISTOPHER D. RICH
13 Clerk of the District Court
14 Ada County, Idaho

15 Date:

5/22/12

By


Deputy Clerk

Appendix C

JUN 26 2012

CHRISTOPHER D. RICH, Clerk
By LUCILLE DANSEREAU
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JOHN THOMAS RAINEY,

Petitioner,

Case No. CV-PC-2012-07699

vs.

**ORDER DISMISSING
SUCCESSIVE PETITION**

THE STATE OF IDAHO,

Defendant.

On April 26, 2012, the Petitioner, John Thomas Rainey, filed a Successive Petition for Post-Conviction Relief, alleging his sentence amounted to cruel and inhuman punishment and the Court disregarded the presentence investigator's sentencing recommendations. He also complains that in his appeal of his last post-conviction case, the Court violated his rights by not appointing counsel on appeal from the Court's decision denying his first post-conviction Petition. Further, he again contends that his trial attorney failed to tell him that statements made during his psychological evaluation and pre-sentence report could be used against him and that he had a constitutional right to refuse to participate. He further contends that his attorney should have sat in on both examinations with him. He also contends that his attorney failed to provide him with an expert that could evaluate his "somnambulism" after being instructed to do so. He claims his attorney forced him to answer a questionnaire to please the Court and that his attorney promised him a certain sentence. Like before, he did not support any of these statements with any other affidavits or evidence. Furthermore, as discussed below, these are the same claims he made in his original Petition – some simply repackaged.

In his original Petition for Post-Conviction Relief, filed on August 9, 2010, Rainey alleged ineffective counsel in Case No. CR-FE-2008-0000398, claiming his attorney failed to tell him that statements made during his psychological evaluation and pre-sentence report could be used against him and that he had a constitutional right to refuse to participate. He further contended that his attorney should have sat in on both examinations with him. He also contended that his attorney failed to provide him with an expert that could evaluate his "somnambulism" after being instructed

1 to do so. Like his Successive Petition, he did not support any of these statements with any other
2 affidavits or evidence. Furthermore, as the Court found in addressing this original Petition, his
3 factual allegations were not supported by the record. The Court denied him counsel at public
4 expense and ultimately entered judgment dismissing the Petition. He appealed. On appeal, the
5 Court denied him counsel and ultimately, the Court of Appeals dismissed his appeal on June 6,
2011.

6 The Court took judicial notice of the underlying record, including the guilty plea taken on
7 July 25, 2008, the sentencing held on October 8, 2008, and the I.C. § 19-2522 psychological
8 evaluation. The Court also took judicial notice of the record on his prior Petition for Post-
Conviction Relief, Case No. CV-PC-2010-15707.

9 Once again, in this Successive Petition, contrary to his contention, the record demonstrates
10 that he was clearly informed by both his attorney *and* the Court about his constitutional right to
11 remain silent. Moreover, he acknowledged in the record he had been informed. In addition, as the
12 Court found in his first Petition, he has no right to counsel during these evaluations. Based on the
13 documents in the file, in an exercise of discretion, the Court found Rainey was not entitled to
14 appointment of counsel at public expense because, like before, taking every inference in his favor,
15 he failed to allege facts that raise the *possibility* of a valid claim on a Successive Petition. The
16 Court found that all of the claims alleged in the Successive Petition were frivolous, and therefore,
the Court denied his Motion for Attorney on May 7, 2012.

17 Having reviewed the Successive Petition and any evidence in a light most favorable to
18 Rainey, the Court again finds that it is satisfied that Rainey is not entitled to successive
19 post-conviction relief. I.C. § 19-4906(2). The Court further finds there is no dispute of material
20 fact and no purpose would be served by any further proceedings. Therefore, having previously
21 given twenty (20) days' notice of its intent to dismiss his Successive Petition, and having received
no additional information, the Court dismisses his Successive Petition.

ANALYSIS

Successive post-conviction applications are prohibited by I.C. §19-4908¹ “where the petitioner ‘knowingly, voluntarily and intelligently’ waived the grounds for which he now seeks relief, or offers no ‘sufficient reason’ for the omission of those grounds in his ‘original, supplemental or amended petition.’” *Palmer v. Dermitt*, 102 Idaho 591, 593, 635 P.2d 955, 957 (1981) (emphasis added); *see also, Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999). The Uniform Post-Conviction Procedure Act (UPCPA) is designed to address collateral attacks upon allegedly improper convictions and sentences, not collateral attacks upon other post-conviction proceedings. *See Wolfe v. State*, 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct. App. 1987). “[T]he ultimate focus of the proceeding would remain, as it should, on whether the second application has raised not merely a question of post-conviction counsel's performance but substantive grounds for relief from the conviction and sentence.” *Wolfe*, 113 Idaho at 339, 743 P.2d at 992; *See Griffin v. State*, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006). A successive petition for post-conviction relief may be summarily dismissed if the grounds for relief were finally adjudicated or waived in the previous post-conviction proceeding. I.C. § 19-4908. *Griffin v. State*, 142 Idaho 438, 441-442, 128 P.3d 975, 978-979 (Ct. App. 2006).

The Court, therefore, must determine whether the new claims were finally adjudicated in the first proceeding or whether there was “sufficient reason” for Rainey to have omitted these “new grounds.” In addition, a number of Rainey’s claims regarding the propriety of this Court’s sentence are not cognizable post-conviction claims and he is bound by res judicata because this Court’s sentence was appealed and affirmed. Finally, many of Rainey’s claims are factually disproved by the record. “If the record conclusively disproves an essential element of a post-conviction claim,” or if the petitioner’s allegations fail as a matter of law, summary dismissal is appropriate. *McKay v. State*, 148 Idaho 567, 225 P.3d 700 (2010); *Workman v. State*, 144 Idaho

¹ I.C. § 19-4908. “All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.”

518, 523, 164 P.3d 798, 803 (2007); *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990).

A. The challenge to his sentence is not a proper basis for post-conviction relief and there is no factual basis for any of his claims related to his sentence in any event.

Like before, Rainey never filed any affidavits creating a factual issue regarding the Court's sentence, including mitigating evidence or errors in the presentence investigation report. The Court is not required to accept mere conclusory allegations, unsupported by admissible evidence, or a petitioner's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

However, claims that a sentence is unduly harsh affords no basis for post-conviction relief if the sentence is otherwise legal. *Murray v. State*, 121 Idaho 918, 922, 828 P.2d 1323, 1327 (Ct. App. 1992); *Brandt v. State*, 118 Idaho 350, 796 P.2d 1023 (1990); *Ferrier v. State*, 115 Idaho 886, 771 P.2d 550 (Ct. App. 1989); *Williams v. State*, 113 Idaho 685, 747 P.2d 94 (Ct. App. 1987); *Ramirez v. State*, 113 Idaho 87, 741 P.2d 374 (Ct. App. 1987). A post-conviction relief proceeding under I.C. §19-4901 is designed to permit a challenge to an underlying conviction or to an illegal sentence; it is not intended as a means of pursuing a collateral attack upon the manner in which the trial court exercised its sentencing discretion. *Id.*; see *Brandt*, 118 Idaho at 352, 796 P.2d at 1025. Moreover, the remedy provided by the post-conviction procedure act is not a substitute for an appeal from a sentence or conviction. I.C. §19-4901(b).

In addition, to the extent Rainey makes claims that the Court did not follow the plea agreement, the record clearly establishes that the Court was not bound by the plea agreement and that Rainey was fully aware that the Court was not bound. There is no factual basis for this claim. "If the record conclusively disproves an essential element of a post-conviction claim," or if the petitioner's allegations fail as a matter of law, summary dismissal is appropriate. *McKay v. State*, 148 Idaho 567, 225 P.3d 700 (2010); *Workman v. State*, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990).

Finally, this Court's sentence was challenged on appeal and it was upheld. When legal issues are decided in a criminal action on direct appeal, the defendant is barred by the doctrine of *res judicata* from raising them again in a post-conviction relief proceeding. *State v. Beam*, 115

1 Idaho 208, 210, 766 P.2d 678, 680 (1988); *State v. Fetterly*, 115 Idaho 231, 233, 766 P.2d 701,
2 703 (1988). Thus, all issues raised by Rainey related to the Court's sentence, including the
3 victim's history, are barred or have no factual basis. "If the record conclusively disproves an
4 essential element of a post-conviction claim," or if the petitioner's allegations fail as a matter of
5 law, summary dismissal is appropriate. *McKay v. State*, 148 Idaho 567, 225 P.3d 700 (2010);
6 *Workman v. State*, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); *Stuart v. State*, 118 Idaho 865,
869, 801 P.2d 1216, 1220 (1990).

7 **B. Rainey does not raise any new contentions in his Successive Petition and does
8 not establish why the contentions were not raised in his original Petition.**

9 On August 9, 2010, Rainey filed his original Petition for Post-Conviction Relief, alleging
10 ineffective counsel in Case No. CR-FE-2008-0000398, based on his allegation that his attorney
11 failed to tell him that statements made during his psychological evaluation and pre-sentence report
12 could be used against him and that he had a constitutional right to refuse to participate. He further
13 contended that his attorney should have sat in on both examinations with him. He also contended
14 that his attorney failed to provide him with an expert that could evaluate his "somnambulism" after
being instructed to do so. He did not support any of these statements with any other affidavits or
evidence. Furthermore, his factual allegations were not supported by the record.

15 The record proved that Rainey was clearly informed by his attorney *and* by the Court about
16 his constitutional right to remain silent during the pre-sentence report and during his psychological
17 evaluation. He was also clearly informed before participating in either that any statements he made
18 could be used against him at sentencing. "If the record conclusively disproves an essential element
19 of a post-conviction claim," or if the petitioner's allegations fail as a matter of law, summary
20 dismissal is appropriate. *McKay v. State*, 148 Idaho 567, 225 P.3d 700 (2010); *Workman v.*
21 *State*, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d
1216, 1220 (1990). The record also proved that he acknowledged he had been informed.
22 Moreover, as a matter of law, he has no constitutional right to have his counsel attend any
23 evaluation, including the pre-sentence investigation. *Hughes v. State*, 148 Idaho 448, ___, 224 P.3d
515, 528-529 (Ct. App. 2009); *Stuart v. State*, 145 Idaho 467, 180 P.3d 506 (Ct. App. 2007).

24 Rainey also claimed, without evidence, that his trial counsel was ineffective because he did
25 not hire an expert on "somnambulism." However, after being specifically alerted to the fact that he
26

1 must support his claims with evidence, Rainey never supported this claim. The Court informed
2 Rainey that while this contention could properly be considered in an application for post-
3 conviction relief, *Vick v. State*, 131 Idaho 121, 952 P.2d 1257 (Ct. App. 1998), in order to succeed
4 on an ineffective assistance of counsel claim based on trial counsel's failure to procure expert
5 witnesses, he "must assert *facts* that would have been discovered by additional investigation and
6 should offer expert testimony that would have been produced if the funds to hire the experts had
7 been requested." *Aeschliman v. State*, 132 Idaho 397, 405, 973 P.2d 749, 757 (Ct. App. 1999)
8 (quoting *State v. Porter*, 130 Idaho 772, 793, 948 P.2d 127, 146 (1997)(emphasis added)). In fact,
9 the Court informed him when it denied him counsel on August 17, 2010, and again in its Order
10 Conditionally Dismissing Petition issued on August 18, 2010. In his response, he simply reargued
11 his case and provided no evidence to support this claim.

12 In his Successive Petition he is once again raising the very same issues. He cannot use a
13 Successive Petition to simply reargue his earlier Petition. Moreover, to the extent that any of his
14 claims are slightly different, Rainey has not explained why they could not have been raised in his
15 first Petition.

16 **C. Claims related to the Court's decision to deny Rainey appointed counsel on his**
17 **original Post-Conviction Petition appeal are not cognizable.**

18 Rainey complains that this Court violated his constitutional rights by denying his Motion
19 for Appointment of Counsel on Appeal in the original Petition. Rainey could have raised this issue
20 on appeal from the Court's denial on his original post-conviction Petition and did not. While he
21 complains that he was indigent, the Court takes judicial notice of the Court's order allowing for
22 partial payment in the original Petition and the fact that he actually made payments consistent with
23 the Court's order.


24 When legal issues are decided in a criminal action on direct appeal or could have been
25 raised on appeal, the defendant is barred by the doctrine of res judicata from raising them again in
26 a post-conviction relief proceeding. *State v. Beam*, 115 Idaho 208, 210, 766 P.2d 678, 680 (1988);
State v. Fetterly, 115 Idaho 231, 233, 766 P.2d 701, 703 (1988). Thus, all issues raised by Rainey
related to the Court's decision to deny him counsel on appeal from the Court's order denying
counsel are barred or have no factual basis.

CONCLUSION

As discussed above, having reviewed the Successive Petition and any evidence in a light most favorable to Rainey, the Court finds that it is satisfied that Rainey is not entitled to file this Successive Petition and is not entitled to post-conviction relief. I.C. §§ 19-4906(2), 19-4908. The Court further finds there is no dispute of material fact and no purpose would be served by any further proceedings. Therefore, the Court dismisses Rainey's Successive Petition.

IT IS SO ORDERED.

Dated this 26th day of June 2012.


Cheri C. Copsey, District Judge

1 I, Christopher D. Rich, the undersigned authority, does hereby certify that on 26th June
2 2012 I mailed, by United States Mail, one copy of the **ORDER DISMISSING SUCCESSIVE**
3 **PETITION** as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause
4 in envelopes addressed as follows:
5

6 JOHN THOMAS RAINEY
7 IDOC NO. 90457
8 I.S.C.I. 140-9A
9 P.O. BOX 14
10 BOISE, IDAHO 83707-0014

11 GREG H. BOWER
12 ADA COUNTY PROSECUTING ATTORNEY
13 JEAN FISHER
14 DEPUTY PROSECUTING ATTORNEY
15 200 W. FRONT STREET
16 BOISE, IDAHO 83702-5954

17 CHRISTOPHER D. RICH
18 Clerk of the District Court
19 Ada County, Idaho

20 Date: 6/26/12

21 By 

22 Deputy Clerk

